use. Colombia never obtained any financing for its clients (see Pet. App. 4a–5a).

2. The transaction which gave rise to the question presented here is typical of the seven other fraudulent schemes involved in this case. In December 1965, John Martin Neiman, using the assumed name, "S. P. Williams," contacted A. Earle Brown, the owner of Sunrise Mountain Corporation,[4] concerning a three million dollar loan which Brown was attempting to secure (Tr. 1196–1197, 32, 281–282, 288). Brown agreed with Neiman and Crisona to pay $30,000 as a standby fee to Colombia for the loan commitment (Tr. 33–36, 311–313, 1198–1199). Crisona received $7,500 out of the $30,000 as an attorney's fee, and the remainder was deposited in escrow (Tr. 36, 41–43, 50, 314–317, 1203–1204). Thereafter, Brown's attorney, Richard Crake, was persuaded to release the amount in escrow on the assurance that it was needed to finalize the funding, and this money was divided among petitioner and the others (Tr. 63–65, 1205, 1208, 1214–1218). The date for closing on the financing agreement, originally set for around December 20, 1965, was postponed by Colombia throughout December and January 1966, despite Brown's eagerness to obtain the funds (Tr. 51, 319, 68, 89). The loan was never secured (Tr. 68).

3. At trial, Crake testified to the substance of a telephone conversation between himself and Crisona on January 18, 1966 (Tr. 90–94). In the conversation,

[4] Sunrise Mountain Corporation was in the process of a Chapter XI reorganization.

Crake expressed doubt as to the good faith of the officers of Colombia and as to the probability that the financing would be obtained (Tr. 91). In turn, Crisona repeatedly assured Crake that the corporation was legitimate and enumerated several of the allegedly successful business ventures concluded by Colombia (Tr. 91–92). Crisona also told Crake that the $7,500 he had received as an attorney's fee had been turned over to Colombia; that this fee would be returned to him (Crisona) by Colombia in a day or two; and that he expected that final arrangements for the loan would be completed shortly (Tr. 91). At the conclusion of Crake's direct testimony, the jury was allowed to hear a tape recording made by Crake at the time of the conversation and to read from a transcript of the recording (Tr. 96, 114).

An F.B.I. report of an interview with Crake indicated that Crake had recorded other conversations with representatives of Colombia Resources (Tr. 98–99). On cross-examination, Crake testified that he recorded other conversations with Crisona during the three-day period he was in New York in January and that he had turned the tapes over to the government (Tr. 158–159). He also recorded a conference call with Williams (defendant Neiman) and a judge of a bankruptcy court which he also gave to the government (Tr. 160–167).

Counsel for Crisona, subsequently joined by counsel for petitioner and other defendants sought production of all tapes made by Crake in addition to the one about which Crake had testified (Tr. 98–108,

169–180, 275–276, 1270–1278). They based their claim alternatively on 18 U.S.C. 3500, on Rule 16, F.R. Crim. P., and on the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Government counsel claimed that the tapes were not producible, and stated that they contained no material helpful to the defense (Tr. 173). The district judge decided that the government was not required to produce the tapes, and he refused to listen to them himself (Tr. 178, 180, 1278).

The court of appeals concluded that under Rule 16(a), F.R. Crim. P., the tapes were discoverable by the defendant whose voice was recorded thereon as a "statement" of that defendant, as that term is used in the Rule. After having examined the tapes *in camera*, however, the court was convinced that any error in failing to turn over the tapes was harmless (Pet. App. 10a–18a).

ARGUMENT

Relying upon *Alderman* v. *United States*, 394 U.S. 165, petitioner challenges the *in camera* inspection of the tapes by the court of appeals and the court's ruling that their non-disclosure was harmless error. He contends that their materiality can be determined only by the defense. As to this petitioner, however, there can be no doubt of the validity of the judgment that the error was harmless. Crake testified that he neither saw nor spoke to petitioner (Tr. 235). The jury therefore must have based its verdict against petitioner on evidence other than that of Crake, and there was, as summarized in the opinion below, ample other evidence against this petitioner. Moreover, in-

spection of the recordings will reveal that there are no references to petitioner therein.[5]

In *Alderman,* which involved electronic surveillance by the government, the Court indicated that *in camera* inspection might be permissible "if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two" (394 U.S. at 182). Here the court of appeals could plainly see that petitioner was not involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
COLLEEN KOLLAR,
Attorneys.

JANUARY 1970.

[5] The transcripts contain references to certain unknown people who at various times answered the telephone at the office of Colombia. However, the conversations were confined to stating that the intended recipient of the telephone call was not there.

U.S. GOVERNMENT PRINTING OFFICE: 1970